

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

September 24, 1996

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. WEST 96-318-M
 : A.C. No. 10-00402-05551
KINROSS DeLAMAR MINING COMPANY :

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On August 26, 1996, the Commission received from Kinross DeLamar Mining Company (“Kinross”) a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹ The Secretary of Labor filed a response, indicating that he does not oppose the motion for relief filed by Kinross.

Under section 105(a) of the Mine Act an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

¹ On September 6, Kinross filed an amended motion, identical to its original request except that it contains an express reference to a supporting affidavit and an original copy of that affidavit, which is attached to its request as Exhibit 3.

Kinross states that it mailed a timely request for a hearing (“Green Card”) to the Department of Labor’s Mine Safety and Health Administration (“MSHA”), thirty days after it received a Proposed Assessment Form mailed to its mine by MSHA. It asserts that, because of the inaccessible location of its mine, it does not receive regular mail deliveries from the nearest U.S. Post Office, but must make arrangements to pick up and deliver its mail, resulting in a one-day delay in the actual receipt of its mail. K. Mot. at 1-2. Kinross therefore explains that, although the notice of proposed penalty was delivered to the post office on June 24, 1996, it did not receive it until June 25. *Id.* at 2, 4. Kinross further asserts that it mailed and postmarked its Green Card on July 25, but that the postmaster over-stamped, or re-postmarked, the Green Card for July 26. *Id.* at 2-3, 5. Attached as exhibits to Kinross’ motion are copies of the certified mail receipt accompanying the notice of proposed assessment, Kinross’ Green Card, and an affidavit by Mary Barraco, Kinross’ Superintendent of Safety and Environmental Services.

The Commission has held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b) (“Rule 60(b)”), it possesses jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (September 1994).

The Commission has observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Services, Inc.*, 17 FMSHRC 1529, 1530 (September 1995). In accordance with Rule 60(b)(1), the Commission has previously afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See General Chemical Corp.*, 18 FMSHRC 704, 705 (May 1996). It appears from the record that Kinross had a reasonable basis for believing that it timely mailed its Green Card. Even assuming the Green Card was not in fact timely mailed, the untimeliness could be properly found to be attributable to “inadvertence” or “mistake” within the meaning of Rule 60(b)(1) -- due to the unique mail service situation at the Kinross mine. Accordingly, in the interest of justice, we grant Kinross’ unopposed request for relief and reopen

the penalty assessment that became a final order of the Commission. This case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner